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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DANIEL LUIS MAGANA, JR., Defendant and Appellant.	A112793 (San Mateo County Super. Ct. No. SC59595)

Defendant Daniel Luis Magana, Jr., appeals from a judgment convicting him of assault with deadly weapons and/or with force likely to produce great bodily injury. Defendant's attorney has filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436, requesting this court to make an independent review of the record. We have done so and, despite one conspicuous mistake in the proceedings below, we find no arguable basis for reversal and shall therefore affirm the judgment.

Factual and Procedural History

On August 26, 2005, defendant along with two others[1] was charged with unlawfully participating in a criminal street gang (Pen. Code,[2] § 186.22, subd. (a) – count one); assault with a deadly weapon (hands and feet) and/or with force likely to produce great bodily injury upon Mary Vasquez (§ 245, subd. (a)(1) – count two); assault with a

[1] Not all of the charges were made against the two codefendants, neither of whom is a party to this appeal.

[2] All statutory references are to the Penal Code.

deadly weapon (hammer) and/or with force likely to produce great bodily injury upon Mary Vasquez (§ 245, subd. (a)(1) – count three); assault with a deadly weapon (hands and feet) and/or with force likely to produce great bodily injury against a second victim (§ 245, subd. (a)(1) – count four); assault with a deadly weapon (hammer) and/or with force likely to produce great bodily injury against the second victim (§ 245, subd. (a)(1) – count five); assault with a deadly weapon (hands and feet) and/or with force likely to produce great bodily injury against a third victim (§ 245, subd. (a)(1) – count six). With regard to the assault with a hammer alleged in count three, the complaint alleged that defendant personally inflicted great bodily injury. (§ 12022.7, subd. (a).) The complaint also alleges that defendant committed each of the assault offenses for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)); that all of the offenses were serious felonies (§ 1192.7, subd. (c)(8), (23), & (28)); and that defendant had suffered a prior strike (§ 1170.12, subd. (c)(1)).

Defendant initially pled not guilty to all charges, but on December 28, 2005, filed a motion to change his plea. Pursuant to a negotiated disposition, defendant agreed to plead no contest to the assault with a hammer alleged in count three, along with the corresponding enhancement allegations and the prior strike allegation in exchange for a nine-year prison sentence. At the hearing held that same day, however, defendant pled no contest "to the charge alleged in count two, that on or about April 28th, the year 2004, . . . [he] willfully and unlawfully committed an assault upon Mary Vasquez with a deadly weapon, to wit, hand or feet, or by means of force likely to produce great bodily injury in violation of section 245(a)(1)." Defendant admitted the enhancement allegations that "the alleged conduct you just pled to was at the direction of, or in association with, the criminal street gangs"; that "the offense that you just pled to is a serious felony"; and that "the offense that you just admitted to resulted in personal infliction of great bodily injury." Defendant also admitted suffering a prior strike conviction. The trial court calculated defendant's nine-year sentence by doubling the three-year midterm on the assault conviction based on the prior strike and adding a three-year enhancement for the

personal infliction of great bodily injury. Defendant filed a timely notice of appeal, but did not obtain a certificate of probable cause.

Discussion

There was a glaring mistake in taking defendant's plea. While defendant's declaration in support of his change of plea indicates that he was pleading no contest to count three, the defendant's plea was taken to count two. There is no explanation in the record for the mistaken reference to count two, except that defense counsel stated at one point that he did not have the plea form in front of him during the proceedings. The difference is troublesome because the enhancement allegation for the personal infliction of great bodily injury was alleged only under count three, in which it was alleged that the weapon used for the assault was a hammer, and this allegation was not made with respect to count two, in which it was alleged that the deadly weapon was "hands and feet." Thus, defendant pled no contest to an enhancement that was not alleged in the information and to which there probably was no adequate factual basis for the plea. Based on the evidence presented at the preliminary hearing, the only injury on which the enhancement allegation could have been sustained was that inflicted by the hammer.

Nonetheless, any error in this regard is not cognizable on appeal because defendant did not obtain a certificate of probable cause. (See § 1237.5; *People v. Mendez* (1999) 19 Cal.4th 1084, 1095 [defendant cannot challenge the validity of a guilty plea on appeal without obtaining certificate of probable cause].) Absent a certificate of probable cause, an appellate court may not consider whether there was an adequate factual basis for a no contest plea (*People v. Pinon* (1979) 96 Cal.App.3d 904, 910); whether an enhancement was properly pled (*People v. Borland* (1996) 50 Cal.App.4th 124, 128); or whether an agreed upon sentence was properly calculated (*People v. Panizzon* (1996) 13 Cal.4th 68, 78). Had defendant brought the mistaken reference to count two to the trial court's attention by way of an application for a certificate of probable cause, or otherwise, the matter could have been dealt with and corrected in the trial court.

Moreover, defendant was not prejudiced by the trial court's mistaken reference. Counts two and three both refer to an aggravated assault upon the same victim at the

same time. Defendant's declaration in support of the motion to change his plea indicates that he intended to plead no contest to count three and to the enhancement under count three. In the proceedings before the court, defendant explicitly "admit[ted] . . . that the offense that you just admitted to resulted in personal infliction of great bodily injury within the meaning of Penal Code section 12022.7(a)." The factual basis for the admission was stated to be the preliminary hearing transcript, which amply supports the infliction of great bodily harm with the use of a hammer. And, most importantly, the sentence imposed was the nine-year sentence to which defendant agreed.

Defendant was adequately represented by counsel throughout the proceedings. To the extent that any of the confusion regarding the count to which defendant was pleading is attributable to counsel, it resulted in no harm. Defendant did not move to suppress the hammer used in the assault that was recovered from a codefendant's vehicle, so that no issue with regard to the legality of that search survives defendant's plea. (§ 1538.5, subd. (m); *People v. Kaanehe* (1977) 19 Cal.3d 1, 8.) But we perceive no basis on which defendant might have successfully challenged the search in any event.

Disposition

The judgment is affirmed.

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Pollak, J.

We concur:

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McGuiness, P. J.

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Parrilli, J.